THE

FREEDOM OF THE SEAS.

BY

The Hon. BERNHARD R. WISE, K.C.,

Agent-General for New South Wales in London.

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CONTRABAND.

Australians, whose island continent depends for all except bare subsistence upon the safety of ocean communications, naturally takes a special interest in the efforts of President Wilson to maintain "The Freedom of the Seas." A citizen of the Commonwealth passes from its Eastern to its Western side by a sea voyage of six days' duration, while to travel from Sydney to London, by the shortest route, will occupy a month. "The Freedom of the Seas" necessarily, therefore, touches us more intimately than it touches (say) the farmers of the middle States; and we are forced to give special attention to the principles and practice which this phrase embodies. Rules and conventions, which to Americans are a subject of more or less academic interest, are to Australians the conditions of their national existence; and, therefore, it may not be inappropriate that an Australian lawyer should discuss in an American journal some of the restraints which a state of war necessarily imposes upon the over-sea communications of neutral nations.

The Meaning of the Phrase.

Since error proverbially "lurks in generalities," it will be well to begin with a definition. Clearly there must be some limitation on the "Freedom of the Seas," or this would become not "Freedom" but "License." No one, for instance, could invoke this maxim to justify piracy; but all would agree that a pirate ship upon the high seas could properly be sunk or captured. This, then, is the first limitation on the unrestricted right to use the seas, viz., that this use be for a purpose which is lawful. Other minor limitations on the right of an individual to use the high seas have been imposed by all nations in the interest of safe navigation, but these do not concern the present enquiry. We start, then, with this maxim, to which Englishmen adhere no less firmly than Americans: "That all persons may go to and fro upon the high seas without let or hindrance, *while they are engaged upon their lawful business*"; and the same rule applies to lawful trade.

In times of peace, it is substantially true that all commerce and travel are lawful; and, therefore, the free movement of passengers and goods should not be interfered with. But this is not the rule in time of war; because the practice and consent of all civilized nations give a belligerent certain clearly defined rights to interfere with the commerce and travel of neutrals. In a word, war, *ipso facto*, limits the rights of neutrals to an unrestricted use of

ocean highways, and makes unlawful commerce and travel which were lawful in times of peace. But, according to our definition, the maxim of the "freedom of the seas" only applies to business which is lawful, and, therefore, cannot be invoked to justify travel or business which, by the practice of nations, has become unlawful. Thus the question for us is not "Whether England has interfered with the Freedom of the Seas," but "Whether her interference has gone beyond the recognised right of a belligerent?" There may be also a subsidiary question, namely, "Whether, if she has pressed her rights too far, the circumstances did not justify her?" The answer to which will depend upon the further question, "Whether, in breaking the letter of the law, she has not preserved its spirit?"

The principle having been defined, its application may now be considered under the two headings "Contraband" and "Blockade."

The Nature of Contraband.

In a judgment, which expresses also the law of England, Chief Justice Chase (of the Supreme Court of the United States) recognised two classes of contraband goods, viz.:—

Articles, from their nature particularly adapted and primarily used for warlike purposes, which are "absolute" contraband, and:

Articles, capable of being used for warlike purposes, though not exclusively so used, which are "conditional" contraband, and:

> "All merchandise" (he said) "may be divided into three classes. The first consists of articles manufactured and primarily used for military purposes in time of war; the second of articles which might be used for purposes of war or peace, according to circumstances; and the third of articles exclusively used for peaceful purposes. Merchandise of the first class destined to a belligerent country, or to places occupied by the Army or Navy of a belligerent, was always contraband. Merchandise of the second class was contraband only when destined to the military or naval use of a belligerent; while merchandise of the third class was not contraband at all, although it was liable to seizure and condemnation in a Prize Court, for breach of a blockade."*

The distinction, which is drawn by the learned Chief Justice, between Absolute and Conditional contraband is of practical importance, because Absolute contraband is liable to seizure and condemnation in a Prize Court, without proof that it was intended to be used by the enemy in military operations. Conditional contraband, upon the other hand, can only be condemned after proof has been given that it was destined for the enemies' naval and military forces, or for a place of naval or military equipment.† If, as happens frequently, it is uncertain whether goods, which have been declared "conditional contraband," will be

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* (The *Peterhoff*, 5 Wall, p. 58.)

† (See "*The Jonge Margaretha*," 1 Chris. Robinson, p. 189.)

used by the enemy for military purposes, the English practice is to purchase them from the neutral owner at the fair market price. Compensation may be given also for loss occasioned by the seizure of the neutral ship.

Contraband and Neutral Rights.

Two conclusions should be clear from the preceding argument: first, that, unless a belligerent might capture contraband in neutral vessels, there would be no meaning in the word Neutrality; and secondly, that, judged by the test of certainty, which should be the mark of every law, the definition of Contraband is defective. This, however, lies in the nature of things and not in the bad faith of belligerents, because it is impossible to predicate of any article of commerce, that it will never come to possess a military value. This is illustrated in a striking manner by the proposals of the international lawyers, who framed in 1909 a code of war rules known as "The Declaration of London," which Great Britain never ratified. One of these* contained a list of 17 groups of articles which were "not to be declared contraband of war." On this list were cotton,† wool, rubber, and metallic ores; and the reason given for excluding these and the other-named articles was that "none of these were susceptible of use in war."

Nevertheless, a belligerent may not wantonly extend his list of contraband so as to destroy the trade of neutrals, but must exercise his right in good faith and with a due regard to the recognised rules and principles of International Law.

Thus, when Russia, in 1904, included in her list of Absolute contraband every article which could be used for war-like purposes, both Great Britain and the United States announced that they would not recognise any decision of the Russian Prize Courts which ignored the distinction between Absolute and Conditional contraband. The despatch of Mr. Secretary Hay‡ remains the authoritative utterance on this subject. It may be summarised as follows:

> "The true criteria for determining what constitutes contraband are warlike nature, use and destination. These criteria have been arrived at by the common consent of the civilised world after centuries of conflict. The logical results of the Russian doctrine would be to destroy completely all neutral commerce with the non-combatant population of Japan, to obviate the necessity of blockade, and to obliterate all distinc-

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* (Chapter II., Rule 28.)

† Cotton, it will be remembered, was made contraband by the North in the War of Secession, because (as Mr. Bayard wrote in 1886) "Cotton was, to the Confederacy, as much a munition of war as powder and ball, because it furnished the chief means of obtaining these indispensables of war." Owing to this declaration, the cotton trade of Lancashire was paralysed; and for two years the cotton-mill operatives lived on public charity. England, however, never questioned the right of the North to make cotton contraband.

‡ Secretary of State in President Roosevelt's administration.

tion between commerce in contraband and non-contraband goods."

These views were supported by Great Britain; and Russia, after consulting Professor Martens, issued new instructions which recognised the distinction between Absolute and Conditional contraband.

Yet, in spite of this precedent, it must be admitted that the law of contraband, in so far as it affects the freedom of the seas, must present itself in different aspects to belligerents and neutrals. There will be always, too, some nations, which have a power on land wholly disproportionate to that which they can exercise at sea; and which, indeed, may have no means of self-defence except sea power:—

> "Such a nation" (as Mr. Hall has pointed out in his work on "The laws of Neutrals") "will have a marked inclination to extend the list of contraband articles; while other nations, which rely chiefly upon military power, will care more to keep open channels for receiving supplies in time of war, than to preserve the right, which they may be unable to use, of denying them to the enemy."

Nothing can be easier or more gratifying to the instincts of benevolence, than to give away what one does not possess; and it would be the cheapest generosity for a belligerent, whose warships had all been sunk, or bottled up, to surrender its right to take contraband from neutral vessels. In short, the rules as to contraband may seem vague, but they have worked well, as such rules do work, when they regulate the relations of honourable men. Certainly the two maritime powers, England and the United States, are in accord about them.

PART II.

BLOCKADE.

It will be noticed that in the passages already quoted, both Chief Justice Chase and Mr. Secretary Hay speak of a "Blockade," and recognise that, while a belligerent may not, at will, unreasonably extend his list of contraband, he may prohibit all trade between neutrals and his enemy by means of a blockade. This right to prevent access to an enemy port is the maritime analogue of a land-siege, and the most effective measure of constraint which is possessed by a maritime power. It is not surprising, therefore, that military powers, the strength of which is on land, should have endeavoured consistently to limit its effective operation. Neutrals also have a strong interest in regulating its operation.

Accordingly, International Law—which, it must be remembered, is only an expression of the general practice and consent of civilised nations—has defined the conditions, under which a blockade may be established and maintained. Two of these conditions concern us here. The one is that "a blockade must be effective;" the other, "that it must not discriminate in favour of

one neutral as against another." The British blockade of Germany is said to be obnoxious to both these rules.

The doctrine that a blockade must be "effective," which is applied by the Prize Courts both of England and America, requires that it be maintained by a force sufficient to render ingress or egress to and from the blockaded port really dangerous, or, in other words, that no vessel can run the blockade without a substantial risk of capture. In the days of sail, the blockading squadron kept in sight of the blockaded port; but such propinquity could not be required in these days of steam, submarines, and wireless telegraphy. In the words of an authority, "International Law is not a stagnant body of ancient usage, but rather a living body of customs, which preserve their validity by conforming to the progress of the world." The effectiveness of a blockade must be, in each case, a question of fact, to be determined by evidence and with regard to all the circumstances.*

The doctrine of the Continuous Voyage.

Modern conditions have modified the practice of blockades in another important respect. In the wars of the eighteenth and nineteenth centuries, heavy goods were transported almost entirely by water along canals or rivers. Railways either did not exist or were not developed into connecting systems; consequently it was not practicable to land at a neutral port any large quantity of goods, which were intended for the use of a belligerent. Now, however, the place of landing may be many miles distant from the ultimate destination of the goods, and the ostensible destination of a neutral port is no guarantee that the ultimate destination of a cargo is not the country of a belligerent. These new conditions were beginning to make themselves felt during the War of Secession, and were first considered by the Supreme Court of the United States in the well-known case of "The Springbok."

"The Springbok," a British ship on a voyage from London to Nassau, was seized by a United States cruiser and sent in for adjudication, upon the grounds that she was carrying contraband and intended to break the blockade by allowing the cargo to be transhipped at Nassau and sent thence into the Southern States. The Supreme Court held that the evidence showed that the cargo was not intended for Nassau, but was intended to be transhipped there and thence carried on to rebel ports in violation of the blockade. The voyage was, therefore, both in law and according to the intention of the parties, but one voyage—from London to the blockaded ports—and the cargo was liable to be captured during any part of the voyage.† Decisions of the Supreme Court to the same effect were given in the cases of "The Bermuda,"‡ "The Stephen Hart,"§ and "The Peterhoff."‖

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* *See* decision of the Supreme Court in *The Olinde Rodrigues*, 174 U.S., p. 510.

† (5 Wall, p. 1).

‡ (3 Wall, 315).

§ (3 Wall, 559).

‖ (5 Wall, 28).

Great Britain at first protested against these decisions and made them the subject of a claim before the American Claims' Commission, which was appointed under the Treaty of 1871. Her claim for the value of the confiscated cargo was unanimously rejected; and, during the Boer War, England officially accepted the doctrine of the United States Supreme Court by arresting German vessels on the ground that cargo which they were carrying to Delagoa Bay was intended, in fact, to be sent, *viâ* the Portuguese Railway, to the Boers.

The official view of Great Britain is expressed quite clearly by Lord Salisbury,* and is thus summarised by the editor of the 1909 edition of "Hall's International Law."

> "The true view is, as Her Majesty's Government believe, correctly stated in paragraph 813 of Professor Bluntschli's 'Droit International Codifié':
>
> > "'If the ships or goods are consigned to a neutral port, only in order to facilitate (pour mieux venir en aide) their delivery to the enemy, they will be contraband of war and their seizure will be justified.'"

The editor of Mr. Hall's work points out that the doctrine of continuous voyage was applied to contraband also by the Italian Prize Court in 1897.

Sir Edward Grey's Contention.

If the foregoing argument has been followed, it will be hard to find a valid answer to the contention in Sir Edward Grey's despatch to Mr. Page of July 23rd, 1915, which is in these words:

> "The difficulties which imposed on the United States the necessity of re-shaping some of the old rules relating to blockades and contraband, are somewhat akin to those with which the Allies are now faced in dealing with the trade of their enemy. Adjacent to Germany are various neutral countries, which afford her convenient opportunities for carrying on her trade with foreign countries. Her own territories are covered by a network of railways and waterways, which enable her commerce to pass as conveniently through ports in such neutral countries as through her own. A blockade, limited to enemy ports, would leave open routes by which every kind of German commerce could pass almost as easily as through the ports in her own territory. Rotterdam is, indeed, the nearest outlet for some of the industrial districts of Germany."

England, however, puts forward no claim to interfere with goods which are *bonâ fide* destined for the use or consumption of the neutral State, but only with the commerce of the enemy passing through neutral States. Sir Edward Grey's despatch continues:

> "If a blockade can only become effective by extending it to enemy commerce passing through neutral ports, such

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* Parliamentary Papers, Africa, No. 1, 1900.

an extension is defensible and in accordance with principles which have met with general acceptance."

And this, as the case of "The Springbok" shows, is the established doctrine of the Supreme Court of the United States from which Americans are now being bidden to depart in the interests of the sinkers of the "Lusitania."

The enormous increases in the imports of war material into Sweden, Holland and Denmark, the figures of which have been published already, demonstrate that Germany was drawing her supplies from these neutral countries.

Discrimination.

Remains to be considered the charge that England's blockade discriminates in favour of Holland and the Scandinavian States as against America. This has been already so admirably dealt with by Mr. Balfour that little can be added to his answer. It is true that England cannot stop the trade of Germany and Holland, Denmark, and Scandinavia, as she can stop the trade of Germany and Spain or the United States. But as Mr. Balfour says "This is not the result of a deliberate policy but of a geographical accident. It is not due to any desire to favour Scandinavian exporters as compared with American exporters; and in practice, it will have no such effect. They are not, nor to any important extent, can they be competing rivals in the German markets."

Further, England has proved her desire to minimise the injury to American commerce by permitting the import of her goods into these neutral countries under a sufficient guarantee that they will not be re-exported to the enemy. It will be interesting to learn, when the war is over, how many neutral ships have been "captured" by German cruisers while carrying these permitted imports. Nor must it be forgotten (although Heaven forbid that England should ever justify herself by German example), that our Orders in Council were an answer to a German declaration of blockade.

In the words of Mr. Balfour: "Put shortly the case is this:— The Germans declare they will sink every merchant ship which they believe to be British without regard to life, without regard to the ownership of the cargo, without any assurance that the vessel is not neutral, and without even the pretence of a legal investigation. The British reply that, if these are to be the methods of warfare employed by the enemy, the Allies will retaliate by enforcing a blockade designed to prevent all foreign goods from entering Germany and all German goods from going abroad. We may not be within the letter of the law of blockade, but can it be said with truth that we offend against its spirit?"

The Blockade and Foodstuffs.

The final appeal of the Germans to the sympathies of the United States is on behalf of their women and children, whom

(as they allege) England's blockade deprives of food. This appeal comes strangely from the poisoners of the desert wells in South Africa and from those who refuse food to the starving Belgians. But let that pass. Let us examine the contention on its own demerits.

We may concede that, in the accepted British view, the withholding of provisions from an enemy's people is, as a rule, unjustifiable. England wages war, not with women, children, or non-combatants, but only with the armed forces of the enemy. But no rule of law or morality compels her to assist her enemies; and, when once it becomes clear that the importation of foodstuffs or of any other article of commerce is in fact contributing to the greater efficiency of the enemy's armed forces, then these things become rightly liable to seizure, or—which is the same thing—may rightly be prevented from reaching the enemy's hands. In every case, the question must be one of fact, to be proved by evidence. For example, in the Napoleonic wars, England put an embargo on the export of coffee, which is the national beverage of the French; and thus, in the opinion of Professor Rose, who is the best historian of the Napoleonic period, greatly stimulated that general desire for peace which proved ultimately fatal to her Emperor's ambitions.

Similarly, it is the nature of the present war which justifies the British effort to exclude wheat from Germany.

Germany boasts that her armies are "The Nation in Arms," and that every German male is an actual or potential combatant. And it is beyond doubt that the present war is a war, not of campaigns, but of exhaustion, in which victory will go to the Power which can keep its forces longest in the field in superior strength. This is to say that every male citizen, who is fit for service in the last resort must be called into the ranks; and thus the quantum of labour available for civil purposes will be steadily reduced.

The consequence of this organisation of a whole people for war is that it becomes difficult, if not impossible, to draw a line of demarcation between combatants and non-combatants. The Professors who, after experimenting for three years, devised the means of using poisonous gas, which is now the favourite weapon of the Germans, are surely not less "combatants" than the simple soldier who fights with gun and bayonet.

The power of Germany to supply herself with food from her own resources also must be taken into account in judging England's action. England notoriously depends upon her imports of wheat to keep alive her people. Germany, on the contrary, supplies herself with food from her own resources. It is true that she produces only 70 per cent. of her wheat; but wheat is a luxury with Germans, whose staple grain is rye, and not a necessity of life as it is in England. To say that England by prohibiting the imports of wheat is starving non-combatants in Germany, is to ignore the facts. The great majority of German non-combatants can live now exactly as they lived before the war —upon grain which is produced in Germany.

Suppose the situation were reversed, and that Germany could import whatever foodstuffs she desired, one result would be that none of the civilians—all of whom, it must be remembered, in the last resort, must be called into the fighting field—need devote their energies to tilling the soil or gathering the harvest. All the wants of the nation could be supplied by importation from the United States, and the fighting forces of Germany would be increased by thousands of soldiers.

To urge these simple considerations, implies no want of sympathy with the sufferings of German non-combatants; but where the grievance is greatest, sympathy is most apt to be misleading. The German people may be suffering from want of food—although this is not proved yet—but they have the remedy in their own hands. Let enough men be withdrawn from the fighting forces to cultivate the fields of Germany as they were cultivated in time of peace and German non-combatants will have no lack of food; but while Germany turns her cultivators of the soil into soldiers, she has neither a legal nor a moral right to demand that England shall supply her with the products, which these soldiers would have produced, if they had continued at work in their fields.